

7-24-2017

State v. Austin Appellant's Brief Dckt. 44673

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"State v. Austin Appellant's Brief Dckt. 44673" (2017). *Not Reported*. 3740.
https://digitalcommons.law.uidaho.edu/not_reported/3740

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

SALLY J. COOLEY
Deputy State Appellate Public Defender
I.S.B. #7353
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 44673
)	
v.)	ADA COUNTY NO. CR-FE-1981-10383
)	
DOUGLAS B. AUSTIN,)	
)	APPELLANT’S BRIEF
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Douglas Austin appeals from the district court’s orders denying his two Idaho Criminal Rule 35(a) motions to correct an illegal sentence, and his motion for leave to file untimely notice of appeal. Mindful of *State v. Flowers*, 150 Idaho 568, 575 (2011) (holding that a district court is not required to recite the sentencing factors set forth in I.C. § 19-2521 when pronouncing a sentence), mindful that the district court was not required to consider Mr. Austin’s mental health as required by I.C. § 19-2522 because the statute was not in effect at the time of his sentencing, and mindful of *State v. Hartwig*, 150 Idaho 326, 328 (2011) (holding “[t]he timely filing of a

notice of appeal is jurisdictional”), he asserts that the district court abused its discretion by denying the three motions.

Statement of the Facts and Course of Proceedings

On February 11, 1982, Douglas Austin was convicted of second degree murder. (R., pp.112-114.) Mr. Austin was sentenced to indeterminate life. (R., p. 113.) On October 24, 2016, Mr. Austin filed a motion to correct an illegal sentence pursuant to I.C.R. 35(a). (R., pp.126-128.) Mr. Austin asserted that his sentence was illegal because the sentencing court failed to consider the factors set forth in I.C. § 19-2521, when it sentenced him. (R., pp.126-128.)

The court denied the motion without a hearing, holding that Mr. Austin had failed to establish that his sentence was illegal where the district court is not required to recite the factors it considered at sentencing. (R., pp.136-139.) The district court relied on *Flowers* in support of its conclusion. (R., p.137.) Mr. Austin timely appealed from the denial of his motion. (R., pp.144-147, 149-152.) Mindful of the fact that the district court was not required to place on the record its consideration of the factors set forth in I.C. § 19-2521, Mr. Austin submits that the district court erred.

On April 10, 2017, Mr. Austin filed a second motion to correct an illegal sentence pursuant to I.C.R. 35(a) and a supportive memorandum. (Augmentation, pp.7-20.) Mr. Austin asserted that his sentence was illegal because the sentencing court did not order an examination of his mental condition under I.C. § 19-2522, before it sentenced him. (Augmentation, pp.7, 10-17.) Mr. Austin supported his motion with an affidavit asserting he had been diagnosed with multiple mental illnesses. (Augmentation, pp.5-6.) Mr. Austin also asked that counsel be appointed to assist him in pursuing his motion. (Augmentation, pp.3-4.)

The court denied the motion without a hearing, holding that Mr. Austin had failed to establish that his sentence was illegal where the requirements set forth in I.C. § 19-2522 were not effective at the time Mr. Austin was sentenced. (Augmentation, pp.21-24.) The district court noted that Mr. Austin was sentenced before the new statutory provision was effective (July 1, 1982), in support of its conclusion. (Augmentation, p.22.) The district court also denied Mr. Austin's request for appointed counsel, finding appointment was not required as Mr. Austin's motion was frivolous, thus a reasonable person with adequate means would not be willing to pursue it at his own expense, pursuant to I.C. 19-852(2)(c). (Augmentation, pp.22-23.) Mr. Austin timely appealed from the denial of his motion. (Augmentation, pp.27-29.) Mindful of the fact that the district court was not required to consider Mr. Austin's mental health as required by I.C. § 19-2522 because the statute was not in effect at the time of his sentencing, Mr. Austin submits that the district court erred.

On May 30, 2017, Mr. Austin filed a motion for leave to file an untimely notice of appeal. (Augmentation, pp.35-37.) Mr. Austin asserted that his trial attorney failed to file a notice of appeal after trial, which constituted ineffective representation to an individual with a diminished capacity, in violation of the Idaho Rules of Professional Conduct 1.14. (Augmentation, pp.35-36.)

The court denied the motion without a hearing, holding that it had no authority to extend the deadline for filing an appeal as it is jurisdictional. (Augmentation, pp.43-45.) The district court relied on *State v. Hartwig*, 150 Idaho 326, 328 (2011) (holding "[t]he timely filing of a notice of appeal is jurisdictional") in support of its conclusion. (Augmentation, p.43.) Mr. Austin timely appealed from the district court's order. (R., pp.50-54.) Mindful of *State v. Hartwig*, Mr. Austin submits that the district court erred.

ISSUES

1. Did the district court abuse its discretion when it denied Mr. Austin's Idaho Criminal Rule 35(a) motion to correct an illegal sentence?
2. Did the district court abuse its discretion when it denied Mr. Austin's second Idaho Criminal Rule 35(a) motion to correct an illegal sentence?
3. Did the district court abuse its discretion when it denied Mr. Austin's motion to allow late filing of a Notice of Appeal from the original Judgment of Conviction?

ARGUMENTS

I.

The District Court Abused Its Discretion When It Denied Mr. Austin's First Idaho Criminal Rule 35(a) Motion

A motion to correct an illegal sentence may be brought at any time. *See* I.C.R. 35(a). Mr. Austin argued that his sentence was illegal because the district court did not consider the factors set forth in I.C. § 19-2521 before imposing the sentence of imprisonment. (R., pp.126-128.) Mr. Austin based his argument on I.C. § 19-2521 which requires the district court to deal with a convicted defendant without imposing a sentence of imprisonment unless "it is of the opinion that imprisonment is appropriate for protection of the public," and lists six such factors to be considered and also identifies another nine grounds to be "accorded weight in favor of avoiding a sentence of imprisonment." *See* I.C. §19-2521.

In *State v. Flowers*, 150 Idaho 568, 575 (2011), the Idaho Supreme Court held that the district court did not abuse its discretion in sentencing the defendant, and that, "[a] court is not required to recite the factors set forth in Idaho Code § 19-2521, nor is it required to give reasons for imposing the sentence." *Flowers*, 150 Idaho at 575.

Mindful of the analysis in *Flowers*, Mr. Austin nevertheless argues that the district court erred when it denied his first Rule 35(a) motion.¹

II.

The District Court Abused Its Discretion When It Denied Mr. Austin’s Second Idaho Criminal Rule 35(a) Motion

A motion to correct an illegal sentence may be brought at any time. *See* I.C.R. 35(a). Mr. Austin argued that his sentence was illegal because, where the district court was aware that Mr. Austin had several mental health conditions, the district court did not order a mental health evaluation pursuant to I.C. § 19-2522 before imposing the sentence of imprisonment. (Augmentation, pp.7-8, 10-18.) Mr. Austin based his argument on the requirements of I.C. § 19-2522 which requires the district court to appoint a psychiatrist or psychologist to examine and report upon the mental condition of a defendant prior to sentencing, “[i]f there is reason to believe the mental condition of the defendant will be a significant factor at sentencing.” I.C. § 19-2522.

Mr. Austin was sentenced to life, indeterminate, in this case on March 26, 1982. (R., pp.2, 112-114.) He did not appeal from the judgment of conviction. (R., p.2.) Idaho Code § 19-2522 was enacted in 1982, and the Idaho Legislature determined that the statute would “apply to persons against whom a criminal complaint is filed on or after July 1, 1982.” 1982 Idaho Sess. Laws 927.

¹ Although it is axiomatic that the Idaho Legislature enacted I.C. § 19-2521—legislation that requires the district court to consider certain factors at sentencing—yet the decision in *Flowers* holds that the court is not required to orally state that it considered the factors, Mr. Austin nevertheless acknowledges that *Flowers* is controlling in this circumstance.

Mindful of the fact that the district court was not required to consider Mr. Austin's mental health as required by I.C. § 19-2522 because the statute was not in effect at the time of his sentencing, Mr. Austin submits that the district court erred.

III.

The District Court Erred In Holding That It Did Not Have Jurisdiction To Extend The Time For Mr. Austin To Appeal From His Judgment Of Conviction

An appeal is timely if it is filed 42 days from an appealable order. I.A.R. 14. “[F]ailure to file a timely notice of appeal deprives the appellate court of jurisdiction and requires dismissal of the appeal.” *State v. Schultz*, 147 Idaho 675, 677 (Ct. App. 2009); I.A.R. 21. A motion to enlarge the period of time to do an act excludes the filing of a notice of appeal. I.C.R. 45(b).

In *State v. Hartwig*, the Idaho Supreme Court held that “[t]he timely filing of a notice of appeal is jurisdictional.” 150 Idaho 326, 328 (2011) (quoting *In re Universe Life Ins. Co.*, 144 Idaho 751, 755 (2007)). The *Hartwig* Court quoted the holding of the Idaho Supreme Court in *State v. Jakoski*, “[a]bsent a statute or rule extending its jurisdiction, the trial court’s jurisdiction to amend or set aside a judgment expires once the judgment becomes final, either by expiration of the time for appeal or affirmance of the judgment on appeal.” *Hartwig*, 150 Idaho at 328 (quoting *State v. Jakoski*, 139 Idaho 352, 354-355 (2003)).

Here, Mr. Austin filed his motion for leave to file an untimely appeal more than thirty years after the judgment of conviction was entered. (Augmentation, pp.35-37.) In his motion, Mr. Austin asked for leave to file a notice of appeal timely from his 1982 judgment of conviction. (Augmentation, p.35.) The district court denied the motion, holding it did not have jurisdiction to extend the period of time for filing a notice of appeal. (Augmentation, pp.43-45.)

Mindful of the analysis in *Hartwig*, Mr. Austin nevertheless argues that the district court erred when it denied his motion for leave to file an untimely notice of appeal.

CONCLUSION

Mr. Austin respectfully requests that the district court's orders denying his motions to correct an illegal sentence and motion to enlarge time to file a notice of appeal be reversed.

DATED this 24th day of July, 2017.

_____/s/_____
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of July, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

DOUGLAS B AUSTIN
INMATE #18341
ISCI
PO BOX 14
BOISE ID 83707

JASON D SCOTT
DISTRICT COURT JUDGE
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

SJC/eas